Nos. 14-556, 14-562, 14-571, 14-574

Supreme Court, U.S.
FILED
APR - 2 2015
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMES OBERGEFELL, et al.,
Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, et al.,
Respondents.

VALERIA TANCO, et al.,
Petitioners,

v.

BILL HASLAM, GOVERNOR OF TN, et al.,
Respondents.

APRIL DEBOER, et al.,
Petitioners,

v.

RICK SNYDER, GOVERNOR OF MI, et al.,
Respondents.

GREGORY BOURKE, et al.,
Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KY, et al.,
Respondents.

On Writs Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF CATHOLIC ANSWERS IN SUPPORT OF RESPONDENTS

CHARLES S. LIMANDRI
Counsel of Record
PAUL M. JONNA
JEFFREY M. TRISSELL
FREEDOM OF CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, CA 92067
(858) 759-9948
climandri@limandri.com
Counsel for Amicus Curiae
Catholic Answers

April 2, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This case concerns whether the People have the right to define "marriage" or whether the Fourteenth Amendment of the federal Constitution removes that right from them. For the most part, the People have defined "marriage" as a union between one man and one woman. They have chosen that definition of marriage because of a deference to traditional wisdom, and because of sound, contemporary arguments.

Recently, various individuals have sought to change several aspects of the definition of "marriage." In some States, the People agreed with them, and in other States, the People preferred the traditional definition of marriage. At the heart of the redefinition attempts was the argument that the traditional definition of marriage violated the dignity of sexual minorities. In States where the People did not find that argument compelling, it changed into the argument that the traditional definition of marriage was being maintained for the *purpose* of violating the dignity of sexual minorities. This is simply not the case. The People's desire to preserve the traditional definition of marriage is neither inspired by animus nor bigotry. It is a choice made by informed and engaged individuals who seek to strike a balance between preserving the rights of religious believers while also promoting the dignity of sexual minorities.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF IDENTITY AND INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	5
A. Sexual Orientation Does Not Fit Within The Equal Protection Jurisprudence Framework	5
B. Religious Liberty Is A Fundamental Right That, When Properly Respected, Broadly Protects The Personal Duty To Live One's Faith	9
C. A Broad And Fundamental Conflict Exists Between Religious Liberty And Sexual Orientation Protections	14
D. Recognizing Sexual Orientation As A Suspect Class Will Legally Undermine The Ability Of Many Religious People To Live Their Faiths	26
1. Exclusion from the Public Square	30
2. Encroachment on Private Liberty	33
3. Defining Millions of Religious Believers as Bigots	36
CONCLUSION	39

TABLE OF AUTHORITIES

Page

CASES

SUPREME COURT

Adarand Constr., Inc. v. Peña, 515 U.S. 200 (1995) 26

Baker v. Nelson, 409 U.S. 810 (1972) 2

Bowen v. Gilliard, 483 U.S. 587 (1987) 8

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 7, 8, 27, 29

Clark v. Jeter, 486 U.S. 456 (1988) 26

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 13

Craig v. Boren, 429 U.S. 190 (1976) 29

Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829 (1989) 19

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) 11, 13

McDaniel v. Paty, 435 U.S. 618 (1978) 38

Plyler v. Doe, 457 U.S. 202 (1982) 8

Romer v. Evans, 517 U.S. 620 (1996) 7, 26

Swanner v. Anchorage Equal Rights Commission, 513 U.S. 979 (1994) 31

Thomas v. Review Board, 450 U.S. 707 (1981) 19

United States v. Ballard, 322 U.S. 78 (1944) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Windsor, 133 S. Ct. 2675 (2013)....*passim*

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).....29

West Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).....38

CIRCUIT COURT

American Family Ass'n v. City & Cnty. of San Francisco, 277 F.3d 1114 (9th Cir. 2002).....20

Barnes-Wallace v. City of San Diego, 704 F.3d 1067 (9th Cir. 2012).....34

Bostic v. Shaefer, 760 F.3d 352 (4th Cir. 2014).....2, 27

Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003).....32

Canyon Ferry Baptist Church of E. Helena v. Unsworth, 556 F.3d 1021 (9th Cir. 2009).....10, 12

Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco, 624 F.3d 1043 (9th Cir. 2010).....12, 20

DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).....2, 27

Dixon v. Univ. of Toledo, 702 F.3d 269 (6th Cir. 2012).....20

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).....21

Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011).....20

TABLE OF AUTHORITIES – Continued

Page

Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) 2, 27

Massachusetts v. U.S. Dept. of Health & Human Srvs., 682 F.3d 1 (1st Cir. 2012) 2, 27

Morrison v. Bd. of Educ. of Boyd Cnty., 521 F.3d 602 (6th Cir. 2008) 21

Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008) 21

Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004) 35

Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988) 31

SmithKline Beecham Corporation v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) 2, 27

Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999) 31

Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134 (9th Cir. 2000) 31

Ward v. Polite, 667 F.3d 727 (6th Cir. 2012) 20

Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874 (7th Cir. 2011) 21

DISTRICT COURT

Barnes-Wallace v. Boy Scouts of Am., 275 F.Supp.2d 1259 (S.D. Cal. 2003) 34

Gadling-Cole v. West Chester Univ., 868 F.Supp.2d 390 (E.D. Pa. 2012) 35

TABLE OF AUTHORITIES – Continued

Page

Hansen v. Ann Arbor Pub. Schs., 293 F.Supp.2d 780 (E.D. Mich. 2003) 21

Kitchen v. Herbert, 961 F.Supp.2d 1181 (D. Utah 2013) 2

Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010) 18, 19

Slater v. Douglas Cnty., 743 F.Supp.2d 1188 (D. Or. 2010) 36

STATE COURTS

Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994) 31

Cochran v. City of Atlanta, Georgia, No. 1:15-cv-00477-LMM (N.D. Ga., Feb. 18, 2015) 21

Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012) 19

Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53 19

Ferguson v. JONAH, No. L-5473-12 (N.J. Super. Ct., L. Div., Feb. 10, 2015) 21

Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) 37

State of Washington v. Arlene's Flowers, Inc., Nos. 13-2-00871-5, 13-2-00953-3 (Wash. Super. Ct., Feb. 18, 2015) 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES & RULES

42 U.S.C. § 2000e 35

Cal. Bus. & Prof. Code § 865 23

D.C. Code § 7-1231.14a 23

N.J. Stat. § 45:1-55 23

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

1 Corinthians 7:1-6 (New American Bible, Revised Edition) 15

Acts 6:2-4 (New American Bible, Revised Edition) 11

Acts 5:29 (New American Bible, Revised Edition) 12

American Psychological Association, *Answers to your questions: For a better understanding of sexual orientation and homosexuality* (2008), *available at* www.apa.org/topics/sorientation.pdf (last visited Feb. 24, 2015) 8

American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) 8

Catholic Church, *Catechism of the Catholic Church* § 2357 (2012) 28, 36

TABLE OF AUTHORITIES – Continued

Page

Catholic Church, *Catechism of the Catholic Church* § 2358 (2012) 17

Catholic Church, *Catechism of the Catholic Church* §§ 2392-2400 (2012) 16

CBC News, *World Sikh group against gay marriage bill*, March 28, 2005, *available at* http://www.cbc.ca/news/canada/world-sikh-group-against-gay-marriage-bill-1.536239 (last visited Feb. 24, 2015) 37

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties, in Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, 123 (Douglas Laycock, *et al.* eds. 2008) 14, 33

Dan Morris-Young, *Eight California lawmakers, San Francisco archbishop exchange letters on faculty handbook*, Feb. 20, 2015, National Catholic Reporter, *available at* http://ncronline.org/blogs/ncr-today/eight-california-lawmakers-take-issue-san-francisco-archbishop-faculty-handbook (last visited Feb. 24, 2015) 24

Deuteronomy 15:11 (New American Bible, Revised Edition) 11

Don Lattin, *Dalai Lama Speaks on Gay Sex: He says its wrong for Buddhists but not for society*, SF Gate, June 11, 1997, *available at* http://www.sfgate.com/news/article/Dalai-Lama-Speaks-on-Gay-Sex-He-says-it-s-wrong-2836591.php 37

TABLE OF AUTHORITIES – Continued

Page

Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011) 18

Genesis 38:9-10 (New American Bible, Revised Edition) 15

Hebrews 10:24 (New American Bible, Revised Edition) 10

Hebrews 10:25 (New American Bible, Revised Edition) 13

His Holiness Pope Francis, *Meeting with Families*, Jan. 16, 2015, *available at* http://w2.vatican.va/content/francesco/en/speeches/2015/january/documents/papa-francesco_20150116_srilanka-filippine-incontro-famiglie.html (last visited Mar. 18, 2015) 17

Human Rights Campaign, *The Best of the Worst: Catholic Bishops Across the Country*, 2014, *available at* http://www.hrc.org/files/assets/resources/The_Best_of_the_Worst.pdf (last visited Feb. 24, 2015) 24

Isaiah 58:5-7 (New American Bible, Revised Edition) 10

James 1:27 (New American Bible, Revised Edition) 10

James 2:26 (New American Bible, Revised Edition) 10

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) 10

TABLE OF AUTHORITIES – Continued

Page

James Phelan, *Successful Outcomes of Sexual Orientation Change Efforts (SOCE): An Annotated Bibliography* (2014) 8

Jennifer Abodeely, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 Scholar 585 (2010) 34

Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. Times, Sept. 18, 2007, *available at* http://www.nytimes.com/2007/09/18/nyregion/18grove.html (last visited Jan. 25, 2013) 22

Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 Am. J. Juris. 1 (1998) 9

Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. Times, April 26, 2004, *available at* http://www.nytimes.com/2004/04/26/us/obey-same-sex-marriage-law-officials-told.html (last visited Feb. 24, 2015) 23

Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. Times, Dec. 28, 2011, *available at* http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?pagewanted=all (last visited Feb. 24, 2015) 22

Leviticus 18:22 (New American Bible, Revised Edition) 37

TABLE OF AUTHORITIES – Continued

Page

LifeSite News, *APA: Classifying pedophilia as a 'sexual orientation' was an 'error,'* Nov. 4, 2013, *available at* https://www.lifesitenews.com/news/apa-classifying-pedophilia-as-a-sexual-orientation-was-an-error (last visited Mar. 11, 2015) 8

Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 Liberty U. L. Rev. 537 (2010) 25

Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1-58 (Douglas Laycock, *et al.* eds., 2008) 22

Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 Fla. Coastal L.J. 135 (2010) 33

Martin Luther King, Jr., *Letter From Birmingham Jail* (1963), *available at* http://mlk-kpp01.stanford.edu/kingweb/liberation_curriculum/pdfs/letterfrombirmingham_wwcw.pdf at 9 (last visited Feb. 24, 2015) 12

Matthew 22:21 (New American Bible, Revised Edition) 12

Matthew 25:34-40 (New American Bible, Revised Edition) 11

Merriam-Webster Online Dictionary, *Bigot*, *available at* http://www.merriam-webster.com/dictionary/bigot (last visited Feb. 24, 2015) 7

TABLE OF AUTHORITIES – Continued

Page

Pew Research Center, *Section 3: Social & Political Issues: Homosexuality and Same-Sex Marriage*, Sept. 22, 2014, *available at* http://www.pewforum.org/2014/09/22/section-3-social-political-issues/ (last visited Feb. 24, 2014) 38

Robert P. George, *Marriage, Religious Liberty, and the "Grand Bargain"*, July 19, 2012, *available at* http://www.thepublicdiscourse.com/2012/07/5884/ (last visited Feb. 24, 2015) 16, 18

Romans 1:26-27 (New American Bible, Revised Edition) 37

Ronald J. Colombo, *The Naked Private Square* (2012), Hofstra Univ. Legal Studies Research Paper No. 12-26, at 29-30, *available at* http://ssrn.com/abstract=2173801 13

Rotseah uShmirat Nefesh 1:14 (Rabbi Eliyahu Touger, trans., Moznaim Publishing 1997) 11

Scott Sloan, *Commission Sides with Gay Group against Hands on Originals*, Lexington Herald-Leader, Nov. 26, 2012, *available at* http://www.kentucky.com/2012/11/26/2421990/cityrules-hands-on-originals.html (last visited Feb. 24, 2015) 23

Shima Baradaran-Robison, *et al.*, *Religious Monopolies and the Commodification of Religion*, 32 Pepp. L. Rev. 885 (2005) 39

TABLE OF AUTHORITIES – Continued

Page

Sioux City Journal, *Official: Iowa Clerks Must Obey Marriage Ruling*, April 17, 2009, *available at* http://siouxcityjournal.com/news/official-iowaclerks-must-obey-marriage-ruling/article_b4f5e728-35b1-5d30-941d-8df2d4b34206.html (last visited Feb. 24, 2015) 24

Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 Daily Comp. Pres. Docs. 00004, p. 1 (Jan. 2, 2013) 24

Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481 (2004) 29

The Bahá'í Faith, *Lights of Guidance: A Bahá'í Reference File*, # 1222 36

The Koran 431, *Surah* 33:35 (Arthur J. Arberry, trans., Oxford Univ. Press 1983) 11

The Koran 662, *Surah* 107:1-7 (Arthur J. Arberry, trans., Oxford Univ. Press 1983) 11

Theo Sandfort, *et al.*, *Same-sex Sexual Behavior and Psychiatric Disorders*, 58 Archives of Gen. Psychiatry 85 (Jan. 2001) 28

The Southern Baptist Convention, *Resolution on Homosexuality of the Southern Baptist Convention* (1988), *available at* http://www.sbc.net/resolutions/610 (last visited Feb. 24, 2015) 36

TABLE OF AUTHORITIES – Continued

Page

Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. Times, Sept. 27, 2011, *available at* http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html (last visited Feb. 24, 2015) 23

Timothy Keller, *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God* 221 (2011) 15, 16

Timothy Samuel Shah, The Witherspoon Institute Task Force on International Religious Freedom, *Religious Freedom: Why Now? Defending an Embattled Human Right* 12 (2012) 9

Torah Declaration, *Declaration On The Torah Approach To Homosexuality*, *available at* http://www.torahdec.org (last visited Feb. 24, 2015) 36

United Methodist Church, *The Book of Discipline of the United Methodist Church*, ¶ 304.3 (2012) 36

STATEMENT OF IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

Catholic Answers is America's largest lay-run organization dedicated to Catholic apologetics and evangelization. It began in 1979 and uses a wide variety of media to explain and defend the teachings of the Catholic Church. These media include print, audio and video publications, as well as a daily live call-in radio program and extensive online resources. Catholic Answers is an apostolate dedicated to serving Christ by bringing the fullness of Catholic truth to the world. It helps good Catholics become better Catholics, bring former Catholics "home," and lead non-Catholics into the fullness of the faith.

SUMMARY OF THE ARGUMENT

This Court has been asked to determine whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex. This determination necessarily requires the recognition of sexual orientation as a suspect or quasi-suspect class for purposes of federal equal protection

[1] This brief is filed with the consent of all parties; copies of their consent letters have been submitted to this Court. Sup. Ct. R. 37.2(a). Pursuant to Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any other party and that no person or entity other than *amicus* or his counsel has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

jurisprudence. To recognize sexual orientation as a suspect class, however, would necessarily diminish the ability of religious individuals and communities in the United States to live according to their faith. Moreover, this Court has previously conspicuously avoided answering the question of whether sexual orientation is a suspect or quasi-suspect class. *See United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("The sum of all the Court's nonspecific hand-waving is that this law is invalid maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role.") (parentheses omitted); *Baker v. Nelson*, 409 U.S. 810 (1972).

Some federal courts have recently interpreted this Court's rulings as mandating that sexual orientation be considered a suspect classification subject to "heightened scrutiny." *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014); *see also Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Shaefer*, 760 F.3d 352 (4th Cir. 2014). Other federal courts, however, have been reluctant to so hold. *DeBoer v. Snyder*, 772 F.3d 388, 402-03 (6th Cir. 2014).

One of the greatest concerns offered by courts is the reality that recognizing sexual orientation as a suspect class would have "far-reaching implications." *Massachusetts v. U.S. Dept. of Health & Human Srvs.*, 682 F.3d 1, 9 (1st Cir. 2012) ("[T]o create such a

new suspect classification for same-sex relationships would have far-reaching implications . which we are neither empowered to do nor willing to predict."); *see also Windsor*, *supra*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come."). One of the most significant of those far-reaching consequences would be its harmful impact on religious liberty. There is already a broad and intense conflict between the gay rights movement and religious liberty regarding marriage, family, and sexual behavior. If the Court creates a new suspect classification for sexual orientation, it will take sides in that conflict and place millions of religious believers and organizations at a potentially irreversible disadvantage in their efforts to consistently live out their faith.

This brief first establishes that a belief that marriage is exclusively the union of one man and one woman, and should remain so, is supported by myriad legitimate bases, and is not predicated upon rank discrimination or bigotry, as Petitioners would have this Court believe. Next, the brief addresses some of those legitimate bases by commenting on the nature of religious liberty itself, particularly its essential element that believers have space to not just believe their faith but to live it, both privately and publicly. Next, the brief describes the existing conflict between the gay rights movement and religious believers and organizations. Finally, the brief identifies three specific ways in which raising sexual orientation to a

suspect class would intensify the conflict in a manner that would deeply harm the lives of the fifty percent of Americans who support traditional marriage on religious grounds.

Notably, this harm to religious liberty will occur even though equal protection principles serve to restrict government rather than private actors. In an era of pervasive government influence on private life, what affects the government inevitably affects the governed, and all the more so when the change results from a shift in basic constitutional values. Transforming sexual orientation into a new suspect class will pressure government actors to deny religious citizens participation in the public square, an exclusion that will effectively prevent believers from acting on the requirements of their faiths. Such a change will also provide a legal basis for government agents to restrict the freedom of religious people in the "private square" through the misuse of anti-discrimination laws to penalize religious believers for holding traditional religious beliefs. In sum, if this Court declares that religious judgments about marriage, family, and sexual behavior are the legal equivalent of racism, it will diminish the religious liberty of millions of religious believers and religious communities.

ARGUMENT

A. Sexual Orientation Does Not Fit Within The Equal Protection Jurisprudence Framework.

In *United States v. Windsor*, four members of the Court dissented on various grounds from the majority opinion that the Defense of Marriage Act was unconstitutional. 133 S. Ct. 2675. The most emphatic reason for dissent was due to the Court's painting of support of traditional marriage, and opposition to homosexuality, on moral, philosophical, historical, cultural, sociological, or prudential grounds as baseless bigotry. *Id.* at 2695 ("What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage."); *id.* at 2696 (Roberts, J., dissenting) ("At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.") (emphasis in original); *id.* at 2708 (Scalia, J., dissenting) ("But the majority says that the supporters of this Act acted with *malice* – with *the purpose* to disparage and to injure same-sex couples.") (quotations and citations omitted; emphasis in original).

As Justice Scalia noted, however, the allegation that support of traditional marriage represents a "bare desire to harm" homosexuals is in fact so absurd as to demean the Supreme Court. *Id.* at 2708-09

(Scalia, J., dissenting) (quoting Majority Opinion at 2693) (ellipses omitted). Both he and Justice Alito provide the service of elucidating upon the rationales which make support of traditional marriage not bigotry, but instead a rational, insightful, and compelling viewpoint:

> We can expect [far-reaching consequences] to take place if same-sex marriage becomes widely accepted. . . . There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage.

Id. at 2715 (Alito, J., dissenting) (citations omitted).

> By asking the Court to strike down [laws which do not extend marriage to cover same-sex couples] as not satisfying some form of heightened scrutiny, [Appellees] are really seeking to have the Court resolve a debate between two competing views of marriage. The first and older view . . . sees marriage as an intrinsically opposite-sex institution . . created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. . . . The other, newer view is . a vision that primarily defines marriage as the solemnization of mutual commitment – marked by strong emotional attachment and sexual attraction – between two persons. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

Id. at 2718 (Alito, J., dissenting).

Merriam-Webster's Online dictionary defines a "bigot" as "a person who is obstinately or intolerantly devoted to his or her own opinions and prejudices; especially: one who regards or treats the members of a group (as a racial or ethnic group) with hatred and intolerance." Merriam-Webster Online Dictionary, *Bigot*, *available at* http://www.merriam-webster.com/dictionary/bigot (last visited Feb. 24, 2015). If the Court intends to view support of traditional marriage, and any opposition to homosexuality, as rank discrimination and mere bigotry, then religious adherents would face a nearly insurmountable obstacle. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("It is not within our constitutional tradition to enact laws of this sort."). Here, the Court has been provided with numerous reasons why support of traditional marriage, and opposition to equating sexual orientation with race, is legitimate, intellectually honest, and not mere bigotry.

The legal arguments should be sufficient in themselves, including the strong reality that sexual orientation simply does not fit within the equal protection legal framework because: (1) homosexuality as a defining characteristic is novel, systematic societal discrimination against a "homosexual class" has had a very short history, and such discrimination is already quickly becoming relegated to the past through the democratic process, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (history of discrimination prong); (2) differential treatment of homosexuals with regard to marriage laws is

directly related to achieving the purpose of having marriage laws, *see id.* (ability to contribute to society prong); (3) homosexuals have achieved great political and societal power, *see Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (minority status and political power prong); (4) sexual orientation, and particularly homosexuality, is neither immutable[2] nor discrete,[3] *see Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (immutability

---

[2] American Psychological Association, *Answers to your questions: For a better understanding of sexual orientation and homosexuality* (2008), *available at* www.apa.org/topics/sorientation.pdf (last visited Feb. 24, 2015) ("no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors"); James Phelan, *Successful Outcomes of Sexual Orientation Change Efforts (SOCE): An Annotated Bibliography* (2014) (detailing more than one hundred studies which document sexual orientation change); American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) ("for some, sexual orientation identity . . . is fluid or has an indefinite outcome.").

[3] The concept of sexual orientation is much broader than either heterosexuality and homosexuality, and the mental health professional associations have long debated classifying sexual attractions to individuals based on age as sexual orientations – even including pedophilia as a sexual orientation in the first printing of the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders. LifeSite News, *APA: Classifying pedophilia as a 'sexual orientation' was an 'error,'* Nov. 4, 2013, *available at* https://www.lifesitenews.com/news/apa-classifying-pedophilia-as-a-sexual-orientation-was-an-error (last visited Mar. 11, 2015). It is also difficult to imagine why sexual orientation should not include polyamory; the reality is that the concept of sexual orientation is undefined and will most definitely morph into something quite different from what the Court here contemplates.

and discreteness prong). However, in addition to the legal arguments, the policy arguments – especially those concerning the effects of making sexual orientation a suspect classification on religious adherents – are both relevant and enormously important.

B. Religious Liberty Is A Fundamental Right That, When Properly Respected, Broadly Protects The Personal Duty To Live One's Faith.

A group of religious liberty experts, including adherents of Christianity, Judaism, and Islam, recently explained: "Religion is the effort to achieve a harmony with whatever transcendent order of reality there may be." Timothy Samuel Shah, The Witherspoon Institute Task Force on International Religious Freedom, *Religious Freedom: Why Now? Defending an Embattled Human Right* 12 (2012). This effort at harmony is not embodied "simply [in] a set of theoretical beliefs about reality" but rather in vibrant "human *response* to what is ultimate in reality." Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 Am. J. Juris. 1, 3 (1998) (emphasis added).

Religious liberty, then, means "the freedom to engage one's entire self" – including the self in the context of community – "in pursuit of ultimate reality." Shah, *Religious Freedom*, *supra*, at 16. Our country's founders, who made religious liberty the "first freedom in our Bill of Rights," recognized this fundamental

human right and its primacy. *Canyon Ferry Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1037 (9th Cir. 2009) (Noonan, J., concurring). James Madison himself understood that "[b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785).

A fundamental necessity in many religions, including Christianity, is a code of conduct that appears superficially unrelated to worship, prayer, or theology, and is often manifested by service in the public square. *See, e.g.*, *Isaiah* 58:5-7 (New American Bible, Revised Edition)[4] (commanding believers to oppose and cure social injustice as a form of religious worship); *James* 1:27 ("Religion that is pure . . is . . to care for orphans and widows in their affliction."); *James* 2:26 ("faith without works is dead"); *Hebrews* 10:24 ("We must consider how to rouse one another to love and good works."). Christianity specifically teaches that actions that may not appear inherently religious are a direct, even required, act of service to God, as Jesus taught:

> [T]he righteous will answer him and say, "Lord, when did we see you hungry and feed you, or thirsty and give you drink? When did we see you ill or in prison, and visit you?"

---

[4] All biblical citations are to the New American Bible, Revised Edition.

> And the king will say to them in reply, "Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me."

Matthew 25:34-40 (New American Bible, Revised Edition).

This same religious obligation to serve God beyond the context of ceremonial worship occurs in other faiths, including Judaism and Islam. *See, e.g.*, *Deuteronomy* 15:11 ("Open your hand freely to your poor and to your needy."); *Rotseah uShmirat Nefesh* 1:14 (Rabbi Eliyahu Touger, trans., Moznaim Publishing 1997) ("Whenever a person can save another person's life, but he fails to do so, he transgresses a negative commandment."); *see also* The Koran 662, *Surah* 107:1-7 (Arthur J. Arberry, trans., Oxford Univ. Press 1983) (requiring provision for the needs of the poor); *id.* at 431, *Surah* 33:35 (almsgiving is a precondition to forgiveness).

Thus, religious believers fulfill spiritual obligations by meeting the physical needs of people in a myriad of ways, through adoption agencies, homeless shelters, orphanages, medical clinics, job training, and other practical assistance. This service has deep theological roots in the Christian office of "deacon," which the early Church established to set apart spiritual leaders whose main duty was to "serve at table" and serve those in need. *Acts* 6:2-4 (New American Bible, Revised Edition). Thus, while an act of service may not include explicitly "spiritual" conduct, it retains a fundamentally religious character for many persons of faith. *See Hosanna-Tabor Evangelical Lutheran*

Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012) (noting that even the "heads of congregations" have "secular" duties).

Throughout Church history, this call to serve God by serving His people has often been understood to require political engagement, an understanding which played a key role in our Nation's founding and in its great civil rights movements. *Canyon Ferry*, *supra*, 556 F.3d at 1036-37 (Noonan, J., concurring). As Martin Luther King, Jr. explained, a church that had no impact outside its four walls was an "irrelevant social club," not the vibrant life- and culture-changing institution God commanded it to be. Martin Luther King, Jr., *Letter From Birmingham Jail* (1963), *available at* http://mlk-kpp01.stanford.edu/kingweb/liberation_curriculum/pdfs/letterfrombirmingham_wwcw.pdf at 9 (last visited Feb. 24, 2015).

Similarly, the Catholic Church teaches its members not only to recognize certain things as immoral, but also to oppose through lawful means such immorality as a matter of justice. *See Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1047 (9th Cir. 2010) (en banc) (the Catholic Church teaches that "it was the moral duty of Catholics to oppose" changes regarding family life and structure); *see also Acts* 5:29 (New American Bible, Revised Edition) ("We must obey God rather than men."); *Matthew* 22:21 ("repay to Caesar what belongs to Caesar and to God what belongs to God"). The "very existence" of religious groups is "dedicated to the collective expression and propagation of shared

religious ideals," a mission for which the First Amendment gives "special solicitude." *Hosanna-Tabor*, *supra*, 132 S. Ct. at 712-13 (Alito, J., concurring); *see also Hebrews* 10:25 ("We should not stay away from our assembly, as is the custom of some, but encourage one another.").

Despite this expansive legal, theological, and cultural recognition of religion as an all-encompassing way of life, some wish to push religious believers and communities out of public life by shrinking the First Amendment to protect only "freedom to worship." Ronald J. Colombo, *The Naked Private Square* (2012), Hofstra Univ. Legal Studies Research Paper No. 12-26, at 29-30, *available at* http://ssrn.com/abstract=2173801.

Labeling it as "extreme," this Court has unanimously rejected the government's analogous argument that the First Amendment affords religious groups only the same constitutional protections that "social club[s]" enjoy. *Hosanna-Tabor*, *supra*, 132 S. Ct. at 706-09. Yet by making sexual orientation a new protected class under our Constitution, this Court would hand the government a tremendous weapon with which to constrain traditional churches, synagogues, and mosques to catechism and ceremony, and to force religious believers to restrict the exercise of their faith to those narrow confines. As this Court has already observed in the context of nondiscrimination laws' application to religious organizations, the "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of Church of*

Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987).

C. A Broad And Fundamental Conflict Exists Between Religious Liberty And Sexual Orientation Protections.

If sexual orientation is found to be the constitutional equivalent of race, then religious believers who affirm traditional beliefs regarding marriage and sexuality will suddenly become the equivalent of racists, as will their organizations, ministries, and outreach efforts. Both gay activists and traditional religious believers recognize that there is a fundamental conflict between their positions. According to Professor Chai Feldblum, current Commissioner of the Equal Employment Opportunity Commission, "an inevitable choice between liberties must come into play" with the result being the removal of societal tolerance for "private [religious] beliefs about sexual orientation." Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, 123, 153 (Douglas Laycock, *et al.* eds. 2008).

Commissioner Feldblum claimed that the inevitable clash is between "identity liberty" of homosexuals and "belief liberty" of religious believers. *Id.* at 130. But that assertion falsely assumes that many religious persons do not define their identities by their faith. This incorrect assumption goes to the core of the conflict: many gay-rights advocates see sexual

orientation as a matter of personal identity but dismiss religious liberty as merely a matter of personal opinion, occasionally to be tolerated but generally to be suppressed. Too often gay rights advocates equate traditional religious beliefs regarding sexual orientation and sexual conduct to racism, insisting that these traditional religious beliefs should not be tolerated outside a tightly restricted personal sphere.

By contrast, many traditional religious believers approach issues regarding sexual orientation as primarily moral questions about sexual behavior, rather than personal identity. Moreover, many traditional religious believers experience religion as a matter of personal identity and deem religious liberty to be a fundamental right necessary to allow them to fulfill that identity by living out their duty to obey God. To these people, all sexual behavior outside the bond of marriage between a man and a woman is sinful and, out of obedience to God and respect for His wisdom, should be avoided on both a personal and societal level. *1 Corinthians* 7:1-6 (New American Bible, Revised Edition); *Genesis* 38:9-10. This understanding forms the foundation of traditional Christian sexual morality.[5]

---

[5] The head minister at the Church of the Redeemer in New York City, explains the Christian understanding of sexual relationships as follows: "The Christian sex ethic can be summarized like this: Sex is for use within marriage between a man and woman." Timothy Keller, *The Meaning of Marriage: Facing the Complexities of Commitment with the Wisdom of God* 221 (2011). As to the biblical understanding of marriage, traditional Christianity teaches that "[a]ccording to the Bible, God devised

(Continued on following page)

Such religious beliefs are, of course, in deep conflict with popular conceptions of sexuality. Robert P. George, currently a visiting professor at Harvard Law School, recently identified the conflict:

> Advocates of [same-sex marriage] are increasingly open in saying that they do not see these disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality . . . and those of ignorance, bigotry, and discrimination. . . .

Robert P. George, *Marriage, Religious Liberty, and the "Grand Bargain"*, July 19, 2012, *available at* http://www.thepublicdiscourse.com/2012/07/5884/ (last visited Feb. 24, 2015).

The reality, however, that proponents of traditional marriage are not inspired by "ignorance, bigotry, and discrimination" is obvious. Even His Holiness, Pope Francis, upon whom the "bigotry" label cannot convincingly be attached, has repeatedly affirmed the importance of promoting traditional marriage and not accepting same-sex marriage:

> There are forms of ideological colonization which are out to destroy the family. They are

---

marriage to . . create a stable human community for the birth and nurture of children, and to accomplish . . this by bringing the complementary sexes into an enduring whole-life union." *Id.* at 16; *see also* Catholic Church, *Catechism of the Catholic Church* §§ 2392-2400 (2012).

> not born of dreams, of prayers, of closeness to God or the mission which God gave us; they come from without, and for that reason I am saying that they are forms of colonization. . While all too many people live in dire poverty, others are caught up in . lifestyles which are destructive of family life and the most basic demands of Christian morality. These are forms of ideological colonization. The family is also threatened by growing efforts on the part of some to redefine the very institution of marriage. . .

His Holiness Pope Francis, *Meeting with Families*, Jan. 16, 2015, *available at* http://w2.vatican.va/content/francesco/en/speeches/2015/january/documents/papa-francesco_20150116_srilanka-filippine-incontro-famiglie.html (last visited Mar. 18, 2015); *see also Catechism*, *supra*, at § 2358 ("[Homosexuals] must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.").

If the mere "bigotry" theory, however, is adopted, the policy justifications for promoting traditional marriage will not be the only casualty. Instead, the "people of goodwill" who had "honest disagreements" will themselves be at risk:

> The "excluders" are to be treated just as racists are treated – since they are the equivalent of racists. . . . In the name of "marriage equality" and "non-discrimination," liberty – especially religious liberty and the liberty of

> conscience – and genuine equality are undermined.

George, *Marriage, Religious Liberty, and the "Grand Bargain"*, *supra*.

Religious liberty scholar, Professor Douglas Laycock, recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011). Professor Laycock explains his "sense that the deep disagreements over sexual morality . have generated a much more pervasive hostility to certain kinds of religion, and this hostility has consequences." *Id.* at 414. He further warns against taking a "path [that] causes the very kinds of human suffering that religious liberty is designed to avoid," a path leading to an America in which religious persons "who cannot change their mind [about a moral issue] are sued, fined, forced to violate their conscience, and excluded from occupations if they refuse." *Id.* at 415, 419.

Lest such a warning seem extreme, consider the proceedings below in which a federal district court adopted *as a finding of fact* that "[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians." *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 985 (N.D. Cal. 2010) (Finding No. 77). In support

of this remarkable finding, the district court cited the religious doctrine of the Catholic Church, the Southern Baptist Convention, the Evangelical Presbyterian Church, the Free Methodist Church, the Lutheran Church – Missouri Synod, and the Orthodox Church of America. *Id.* at 986 (Finding Nos. 77(j), (k), (l), (m), (n), (o), (p)).

The First Amendment, however, prohibits federal courts from sitting in judgment of churches' religious doctrine. *United States v. Ballard*, 322 U.S. 78, 86 (1944). "When the triers of fact undertake" to determine the truth of religious doctrines or beliefs, "they enter a forbidden domain." *Id.* at 87. Protection of religious beliefs does not "turn on a judicial perception of the particular belief or practice in question." *Thomas v. Review Board*, 450 U.S. 707, 714 (1981). Essentially, "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire" into religious doctrine. *Id.* at 716; *see also Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829, 833-34 (1989).

Consider a number of recent cases involving conflicts between the gay rights movement and religious liberty:

- A wedding photographer was ordered to pay nearly $6,700 because she declined on religious grounds to photograph a same-sex commitment ceremony. *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, 2013-NMSC-040, 309 P.3d 53;

- A florist was found personally liable for damages and attorney's fees for declining on religious grounds to provide floral arrangements for the same-sex wedding of a long-time customer. *State of Washington v. Arlene's Flowers, Inc.*, Nos. 13-2-00871-5, 13-2-00953-3 (Wash. Super. Ct., Feb. 18, 2015);

- Two graduate students at public universities were expelled from their programs because they were honest about the effect that their religious beliefs would have on their ability to counsel same-sex couples. *Compare Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (reviving student's free speech and free exercise claims) *with Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (denying preliminary injunctive relief to student);

- An African-American woman was fired from her job as a public university administrator for writing a letter to the editor of the local newspaper expressing her religiously motivated viewpoint that the gay rights movement should not be equated with the civil rights movement. *Dixon v. Univ. of Toledo*, 702 F.3d 269 (6th Cir. 2012);

- A municipal government adopted an official resolution "denouncing the Catholic Church and doctrines of its religion" as "hateful and discriminatory rhetoric" because of the church's position that "Catholic agencies not place children for adoption in homosexual households." *Catholic League*, *supra*, 624 F.3d at 1047; *see also American Family Ass'n v. City*

& Cnty. of San Francisco, 277 F.3d 1114 (9th Cir. 2002) (resolution from the same municipality denouncing other religious groups' speech);

- Parents of public schoolchildren challenged a school district's failure to notify them that their children would be taught to accept homosexual relationships despite their parents' contrary religious beliefs. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008);

- Public school students have been forbidden from expressing traditional religious viewpoints regarding homosexual behavior. *See, e.g., Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 875-76 (7th Cir. 2011); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 605-06 (6th Cir. 2008); *Hansen v. Ann Arbor Pub. Schs.*, 293 F.Supp.2d 780, 782-83 (E.D. Mich. 2003); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179-80 (9th Cir. 2006);

- A municipal fire chief was fired after authoring a men's devotional book in his personal time which included brief references to Christian viewpoints on sexual morality. *Cochran v. City of Atlanta, Georgia*, No. 1:15-cv-00477-LMM (N.D. Ga., Feb. 18, 2015);

- A Jewish religious and counseling ministry was found to be potentially in violation of a state Consumer Fraud Act if it described homosexuality as not "a normal variation of human sexuality." *Ferguson v. JONAH*, No.

L-5473-12 (N.J. Super. Ct., L. Div., Feb. 10, 2015).

See also Marc D. Stern, *Same-Sex Marriage and the Churches, in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 1-58 (Douglas Laycock, *et al.* eds., 2008) (collecting cases).

Conflicts and tension between religious believers and the government have not simply been limited to the courts:

- Catholic adoption agencies have been excluded by state governments from providing adoption and foster care services in Massachusetts, Illinois, and Washington, D.C., because of their religious refusal to place children with homosexual couples. *See* Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. Times, Dec. 28, 2011, *available at* http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html?pagewanted=all (last visited Feb. 24, 2015);

- An evangelical ministry was found to have violated a New Jersey antidiscrimination law for refusing to rent its facilities for a same-sex commitment ceremony. *See* Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. Times, Sept. 18, 2007, *available at* http://www.nytimes.com/2007/09/18/nyregion/18grove.html (last visited Jan. 25, 2013);

- Small businesses nationwide run by religious owners have faced charges before human rights commissions for refusing to create expressive products that advocate "gay pride" or endorse homosexual behavior. *See* Scott Sloan, *Commission Sides with Gay Group against Hands on Originals*, Lexington Herald-Leader, Nov. 26, 2012, *available at* http://www.kentucky.com/2012/11/26/2421990/city-rules-hands-on-originals.html (last visited Feb. 24, 2015);

- California, New Jersey and the District of Columbia have passed laws banning psychologists from counseling minor clients about ways to diminish sexual attraction toward – or sexual conduct with – members of the client's same sex. Cal. Bus. & Prof. Code § 865; N.J. Stat. § 45:1-55; D.C. Code § 7-1231.14a;

- Justices of the peace in Massachusetts, and town clerks in Iowa and New York, were told by the States' legal counsel that they must perform same-sex marriages despite religious objections or face liability for discrimination. *See* Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. Times, April 26, 2004, *available at* http://www.nytimes.com/2004/04/26/us/obey-same-sex-marriage-law-officials-told.html (last visited Feb. 24, 2015);[6]

---

[6] *See also* Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. Times, Sept. 27, 2011,

(Continued on following page)

- Congress' recent enactment of religious liberty protection for military service members, including explicit protection for military chaplains whose religious beliefs prohibit them from conducting same-sex commitment ceremonies was criticized in the President's signing statement as "an unnecessary and ill-advised provision." Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 Daily Comp. Pres. Docs. 00004, p. 1 (Jan. 2, 2013);

- California state legislators recently demanded that a Catholic bishop change his policy that adherence to Catholic moral teaching was a prerequisite to employment in a teaching capacity in Catholic schools. Dan Morris-Young, *Eight California lawmakers, San Francisco archbishop exchange letters on faculty handbook*, Feb. 20, 2015, National Catholic Reporter, *available at* http://ncronline.org/blogs/ncr-today/eight-california-lawmakers-take-issue-san-francisco-archbishop-faculty-handbook (last visited Feb. 24, 2015).[7]

---

available at http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html (last visited Feb. 24, 2015); Sioux City Journal, *Official: Iowa Clerks Must Obey Marriage Ruling*, April 17, 2009, *available at* http://siouxcityjournal.com/news/official-iowaclerks-must-obey-marriage-ruling/article_b4f5e728-35b1-5d30-941d-8df2d4b34206.html (last visited Feb. 24, 2015).

Unsurprisingly, the bishop targeted had been included in a list by a gay rights group identifying the "worst" bishops. *See* Human Rights Campaign, *The Best of the Worst: Catholic*

(Continued on following page)

The attacks on religious liberty by the government have, in turn, led to increasing religious intolerance by private individuals. The greatest example of this came in the wake of the passage of Proposition 8 in California in 2008. Numerous religious believers lost their jobs, and businesses owned by religious believers faced boycotts when it was discovered that they had donated to the pro-Proposition 8 campaign. *See* Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 Liberty U. L. Rev. 537, 555-57 (2010).

Members of the Church of Jesus Christ of Latter-day Saints in particular were heavily targeted after their names and addresses were published on the internet resulting "in a spate of violent threats against, attacks upon, and intrusions upon select Mormons, their places of worship, their communities, [and] their businesses . . by homosexual activists to punish and 'pay back' that religious community." *Id.* Turning sexual orientation into a suspect class would provide a new channel for this rage, leading to a wave of assaults on religious liberty – assaults by both private individuals, and assaults with the power of the state behind them.

Religious liberty must be reinforced. The "right to religious freedom" cannot be redefined to mean the

---

Bishops Across the Country, 2014, *available at* http://www.hrc.org/files/assets/resources/The_Best_of_the_Worst.pdf (last visited Feb. 24, 2015).

"right to resign one's job" or the "right to recant one's beliefs." Instead, it must remain the right to hold traditional religious beliefs, even those not shared by the current cultural elite, without fear of retaliation at the workplace or expulsion from the public square.

D. Recognizing Sexual Orientation As A Suspect Class Will Legally Undermine The Ability Of Many Religious People To Live Their Faiths.

In considering whether a law violates the Equal Protection Clause of the Fourteenth Amendment or the implicit equal protection guarantee of the Fifth Amendment, this Court applies different levels of scrutiny to different types of classifications. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 217 (1995). For example, Classifications based on race and national origin are subject to strict scrutiny, while classifications based on sex and illegitimacy receive intermediate scrutiny. *Clark*, *supra*, 486 U.S. at 461. Virtually all other classes receive rational basis scrutiny, which deferentially asks only whether the statutory classification in question is conceivably "rationally related to a legitimate governmental purpose." *Id.* Classifications based on sexual orientation have always been subject to rational basis scrutiny in cases before this Court. *See Romer*, *supra*, 517 U.S. at 632; *Windsor*, *supra*, 133 S. Ct. 2675.

It is only recently, in interpreting the Court's ruling in *Windsor* that some federal courts have begun to erroneously claim that sexual orientation is a suspect classification subject to "heightened scrutiny." *SmithKline*, *supra*, 740 F.3d at 481; *Kitchen*, *supra*, 961 F.Supp.2d at 1205, *aff'd*, 755 F.3d 1193; *Bostic*, *supra*, 760 F.3d at 378-84. Other federal courts, however, have correctly identified that *Windsor* did not raise sexual orientation to a suspect classification. *DeBoer*, *supra*, 772 F.3d at 402-03 ("Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.").

As with recognizing fundamental rights, courts must be careful about identifying new suspect classes because such recognition takes important decisions out of the normal "democratic processes." *City of Cleburne*, *supra*, 473 U.S. at 440. Such caution is particularly apt here given the "far-reaching implications" of raising sexual orientation to a suspect class. *U.S. Dept. of Health & Human Srvs.*, *supra*, 682 F.3d at 9; *Windsor*, *supra*, 133 S. Ct. at 2715 (Alito, J., dissenting).

It might be argued that regardless of any proffered reasons for maintaining traditional marriage, doing so ignores the interests of homosexuals themselves and merely attempts to sacrifice their well-being for the general good of society. This assertion, however, is problematic because homosexuality is not a single phenomenon, and the advent of homosexually identified

persons is recent. Indeed, the homosexual person is so recent and diffuse as to make a sexual orientation based class essentially undefinable. Among the little that is known about that diffuse class, however, is that science can neither state that homosexuality is innate, nor that it is immutable, nor that it is as healthy as heterosexuality.*

The reality is that the emergence of homosexuality as a basis for a class is a particularly novel phenomenon and societal treatment of that new class is being handled effectively in the democratic process. Unnecessary court action could have unforeseen consequences, both for society at large and members of a homosexual class. The Supreme Court has always been loath to announce new fundamental rights and new suspect classes, precisely because doing so interferes with the legislative prerogative. Announcing sexual orientation as a new protected class, when such a purported class is neither discrete, nor immutable, nor politically powerless, would eviscerate the limiting principles to the creation of new suspect classes. This in turn would lead to separation of powers and federalism concerns: curtailing the ability of the legislative branch to draw lines where it sees

---

* *See* Footnote 3; *see also* Theo Sandfort, *et al.*, *Same-sex Sexual Behavior and Psychiatric Disorders*, 58 Archives of Gen. Psychiatry 85, 89, Table 2 (Jan. 2001) (noting mental health disparities between homosexual and heterosexual populations regardless of the degree of societal acceptance); Catholic Church, *Catechism of the Catholic Church* § 2357 (2012) (acknowledging the lack of scientific understanding of homosexuality).

fit, and interfering with the ability of states to govern themselves in their proper sovereign capacities.

These unforeseen consequences would not only apply to society at large, but also to members of a homosexual class. Just as the elevation of sex to a suspect class led to the invalidation of numerous laws intended to protect women, the elevation of sexual orientation to a suspect class could have negative consequences for laws aimed at protecting homosexuals. *See Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *City of Cleburne, supra*, 473 U.S. at 444; *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 487-88 (2004) ("Perhaps the most pressing issue raised by the Court's equal protection jurisprudence is the now primary use of suspect classification analysis to invalidate or call into question measures seeking to remedy past racial discrimination or limit the effects of racial bias in electoral politics."). In this situation the supporters of traditional marriage, and opponents of viewing sexual orientation as a suspect class, suggest that it would be most appropriate for the Court to act with caution.

Constitutional guarantees of equal protection generally limit only *government* action, not private conduct. There are, however, at least three ways in which changing the constitutional status of sexual orientation will harm religious liberty. First, a change in status will increase pressure on government entities to exclude religious groups from public programs and opportunities. Second, governments with sexual

orientation antidiscrimination laws will more likely argue that forbidding discrimination based on sexual behavior is a sufficiently compelling interest to override the rights of religious individuals and entities. Third, adding sexual orientation to the same legal category as race will endorse the message that traditional religious beliefs about marriage and the family are – as a matter of constitutional law – akin to racism, a form of condemnation that will result in marginalization and ostracism of religious believers.

1. Exclusion from the Public Square.

Raising sexual orientation to a suspect class would effectively bar religious citizens from public life. To determine whether the government may restrict First Amendment liberties in order to protect a certain class, courts look to whether this Court has recognized that class as suspect for purposes of equal protection jurisprudence. If a class has been so recognized, courts are much more willing to find that the government's action is supported by a compelling interest, and thus allow regulations to diminish constitutional liberties in order to protect the class. By contrast, if this Court does not recognize a class as suspect, then other courts are much less likely to find government motives to be compelling.

As Justice Thomas has observed, the fact that a certain class had "never been accorded any heightened scrutiny under the Equal Protection Clause" is prime evidence that a law protecting that class likely

does not protect a sufficiently compelling interest to override religious liberty. *Swanner v. Anchorage Equal Rights Commission*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from denial of certiorari); *see also Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 715 (9th Cir. 1999), *rev'd on other grounds en banc*, 220 F.3d 1134 (9th Cir. 2000) (permitting lessors to refuse on religious grounds to lease an apartment to non-married cohabitants: "The fact that courts have not given unmarried couples any special consideration under the Equal Protection Clause is potent circumstantial evidence that society lacks a compelling governmental interest in the eradication of discrimination based upon marital status."); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 239 (Mass. 1994) ("Because there is no constitutionally based prohibition against discriminating on the basis of marital status, marital status discrimination is of a lower order than those discriminations" referred to in the state constitution, *i.e.*, "sex, race, color, creed or national origin.").

By contrast to the marital status discrimination at issue in *Swanner* and *Thomas*, fashioning sexual orientation as a new suspect class akin to race might create significant support for allowing even nonneutral and non-generally-applicable sexual orientation anti-discrimination laws to infringe upon religious liberty. *See, e.g., Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 921 (1st Cir. 1988) (Bownes, J., dissenting in part) ("the states and the federal government have a compelling interest in eliminating

invidious discrimination by private persons on the basis of race and sex. [This validates] statutes aimed at eradicating such discrimination, even though they have the incidental effect of abridging . . First Amendment rights.") (citations omitted).

A good example of how the public square could be closed to believers is a case dealing with the exclusion of the Boy Scouts from a state employees' charitable giving program. In that case a Connecticut government official unilaterally launched an investigation into whether to remove the Boy Scouts from the charitable giving program because the Boy Scouts do not permit homosexuals to become Boy Scout leaders. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003). The state official removed the Boy Scouts from the program, justifying the action as an effort to avoid being "a party to discrimination in violation of Connecticut's Gay Rights Law." *Id.* at 85. After the Boy Scouts sued, the State affirmed that it excluded the Scouts "to ensure that state facilities not be used in furtherance of discrimination and that State employees not be subjected to solicitation on behalf of discriminating organizations." *Id.* at 87. The court ultimately ruled against the Boy Scouts, and one member of the court expressed his opinion that the justification for the ruling should have simply been that Connecticut's compelling interest in enforcing its antidiscrimination statute overrode the Boy Scouts' rights. *Id.* at 92 n.5. Undoubtedly, the State's interest would gain even greater authority were this Court to elevate sexual orientation to a suspect classification.

The potential impact of such a change is staggering. On the public level, religious organizations and individuals may be frozen out of professions like psychological counseling to which states control licensure and ethical requirements. Religious adoption and foster care services, already targeted for exclusion in certain states, may be constitutionally compelled to cease adoption and foster-care placement. Access to public funding for family services conducted by religious organizations could be slashed or barred. Already existing efforts to revoke tax-exempt status for traditional religious groups would intensify. Access to public facilities could become severely restricted, inflicting a potentially fatal blow to the many religious groups and churches that rent school facilities for religious services.

2. Encroachment on Private Liberty.

Raising sexual orientation to a suspect class would also impact religious citizens in their private practices. As a setback for both religious liberty and federalism, states and municipalities that have enacted religious liberty exemptions to their sexual orientation antidiscrimination laws may face lawsuits seeking judicial rescission under the federal Constitution. *See, e.g.*, Feldblum, *Moral Conflict and Conflicting Liberties, supra*, at 150-55 (religious liberty exemptions should be extremely limited); Mark Strasser, *Public Policy, Same-Sex Marriage, and Exemptions for Matters of Conscience*, 12 Fla. Coastal L.J. 135 (2010) (conscience exemptions may

violate constitutional guarantees); Jennifer Abodeely, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 Scholar 585 (2010) (discussing ways to circumvent religious liberty defenses).

Transforming sexual orientation into a new suspect class would not only significantly increase calls for removal of the exemptions, it would provide a legal basis for challenging them. Recently, a same-sex couple and an agnostic couple challenged as unconstitutional a lease in which San Diego permitted the Boy Scouts the use of public land. *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012). The plaintiffs alleged that the leases violated the Equal Protection Clause "by endorsing, supporting, and promoting defendants' discrimination based on sexual orientation." *Id.* at 1084. Although ultimately unsuccessful, the district court did suggest that the claim was colorable. *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F.Supp.2d 1259, 1381 (S.D. Cal. 2003). If this Court gives the government a compelling interest in eradicating sexual orientation discrimination, lower courts might conclude that the Constitution bans accommodations of religion in the context of sexual orientation laws. Indeed, it would open the door to discrimination claims for virtually any religious or moral belief that preferences traditional sexual morality over homosexuality.

The carefully negotiated efforts of states and their citizens to strike a balance in the conflict between

religious liberty and sexual orientation protections could be swept aside. If states and municipalities were forced to remove their religious liberty exemptions, religious individuals and communities would be placed in very precarious positions while living out their faiths. In recognizing sexual orientation as a new suspect class, the Court could unintentionally destroy the compromises of State and local laws, replacing efforts toward mutual accommodation with an all-or-nothing battle worse than the conflicts that led to the compromises.

A related harm from elevating sexual orientation to a suspect class would be the diminished protection that Title VII would offer to shield religious believers from private discrimination. 42 U.S.C. § 2000e. Employers will have less incentive to, and perhaps even feel pressured not to, accommodate expressions of conventional religious beliefs about marriage and the family. At least one appellate court – under the rational-basis standard – has already accepted the argument that it would be an "undue burden" to accommodate religious expression because it would upset the protected homosexual class. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (accommodation of cubicle posters depicting scriptural passages on the morality of homosexual behavior constituted an undue burden); *see also Gadling-Cole v. West Chester Univ.*, 868 F.Supp.2d 390, 397-98 (E.D. Pa. 2012) (permitting arguments that accommodating the plaintiff's religious refusal

to promote homosexuality constituted an undue burden).

Similarly, employees who are required to fulfill job functions that directly conflict with their beliefs will be more likely to face situations where they must either violate their faith or lose their livelihood. *Slater v. Douglas Cnty.*, 743 F.Supp.2d 1188 (D. Or. 2010) (county clerk fired due to request that she not be required to register domestic partners). These conflicts can be world-shattering to the individuals involved.

3. Defining Millions of Religious Believers as Bigots.

In essence, Petitioners ask this Court to declare that the traditional religious beliefs of many Americans – including devout Catholics, Protestants, Mormons, Bahá'ís, Buddhists, Muslims, Orthodox Jews, and Sikhs – are completely wrong on a subject of such singular societal importance that it is a fundamental commitment enshrined in our nation's Constitution. *Catechism*, *supra*, at § 2357; United Methodist Church, *The Book of Discipline of the United Methodist Church*, ¶ 304.3 (2012); The Southern Baptist Convention, *Resolution on Homosexuality of the Southern Baptist Convention* (1988), *available at* http://www.sbc.net/resolutions/610 (last visited Feb. 24, 2015); The Bahá'í Faith, *Lights of Guidance: A Bahá'í Reference File*, # 1222; Torah Declaration, *Declaration On The Torah Approach To Homosexuality*, *available at*

http://www.torahdec.org (last visited Feb. 24, 2015); *Leviticus* 18:22 ("You shall not lie with a male as with a woman."); Don Lattin, *Dalai Lama Speaks on Gay Sex: He says its wrong for Buddhists but not for society*, SF Gate, June 11, 1997, *available at* http://www.sfgate.com/news/article/Dalai-Lama-Speaks-on-Gay-Sex-He-says-it-s-wrong-2836591.php; CBC News, *World Sikh group against gay marriage bill*, March 28, 2005, *available at* http://www.cbc.ca/news/canada/world-sikh-group-against-gay-marriage-bill-1.536239 (last visited Feb. 24, 2015); *Romans* 1:26-27.

Petitioners seek affirmation of their own sexual identities, and corresponding condemnation of contrary religious identities in many ways, and one of the most potent is in obtaining suspect class status for sexual orientation, beause suspect class status has historically been reserved for characteristics against which any differentiation could have no basis and was decisively evil. *See Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (racism is a "revolting moral evil" that the country wisely restricted). By elevating sexual orientation to suspect class status, the Court would place traditional religious beliefs regarding marriage and the family into the same category as racism. The court would also place tens of millions of traditional religious believers into the same category as racists if they merely affirm the traditional faith that their churches, synagogues, mosques, or temples have publicly supported since the inception of their faiths.

Making sexual orientation into a suspect classification, and invalidating state prohibitions on

homosexual marriage, will impose harsh dilemmas on religious believers, dilemmas that should not be forced upon a country founded as a refuge for those seeking religious liberty. The faith communities that, for millennia, have been committed to the belief that sexual conduct should occur only within the marital union of a man and a woman, and which represent fifty percent of the American population, are unlikely to change those beliefs or otherwise fade away. Pew Research Center, *Section 3: Social & Political Issues: Homosexuality and Same-Sex Marriage*, Sept. 22, 2014, *available at* http://www.pewforum.org/2014/09/22/section-3-social-political-issues/ (last visited Feb. 24, 2014) ("The number of people who view homosexual behavior as sinful has [risen] from 45% in 2013 to 50% in the [2014]."). Thus, privileging sexual orientation and its related conduct as a new suspect category will only further deepen and provoke widespread tensions.

Treating religion with such hostility will also not "succeed in keeping religious controversy out of public life, given the political ruptures caused by the alienation of segments of the religious community." *McDaniel v. Paty*, 435 U.S. 618, 641 n.25 (1978) (Brennan, J., concurring in the judgment) (citation omitted). The Court has long recognized that establishing any official orthodoxy creates social and religious strife. *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.").

Cf. Shima Baradaran-Robison, *et al.*, *Religious Monopolies and the Commodification of Religion*, 32 Pepp. L. Rev. 885, 888, 936-37 (2005) (state-sanctioned orthodoxy can embolden the dominant society to persecute those who hold disfavored views). Establishment of a new government orthodoxy would be particularly inappropriate here, where it would make political heretics out of faithful religious citizens and spawn profoundly corrosive conflicts between church and state.

CONCLUSION

The judgment of the Sixth Circuit should be upheld and this Court should continue to allow marriage to be defined and regulated by the States.

Respectfully submitted,

CHARLES S. LIMANDRI
Counsel of Record
PAUL M. JONNA
JEFFREY M. TRISSELL
FREEDOM OF
CONSCIENCE DEFENSE FUND
P.O. Box 9520
Rancho Santa Fe, CA 92067
(858) 759-9948
climandri@limandri.com
Counsel for Amicus Curiae
Catholic Answers

April 2, 2015